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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 695

APPALACHIAN ELECTRIC POWER COMPANY,

Petitioner,

vs.

C. C. McKINNEY

PETITION FOR WRIT OF CERTIORARI

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Bluefield, West Virginia.

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SUPREME COURT OF THE UNITED STATES

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No.

APPALACHIAN ELECTRIC POWER COMPANY,
Petitioner,

vs.

C. C. McKINNEY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner, Appalachian Electric Power Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review a judgment of the United States Court of Appeals for the Fourth Circuit rendered on November 12, 1958, reversing a judgment of the United States District Court for the Southern District of West Virginia, in favor of petitioner.

Opinions Below

The memorandum opinion of the United States District Court for the Southern District of West Virginia, the judgment entered by said Court on June 11, 1958, embodying

certain findings of fact and conclusions of law, and the opinion of the Court of Appeals for the Fourth Circuit are set forth in the appendix to this petition. The latter opinion has not been published in the reports.

Jurisdiction

1. The judgment sought to be reviewed was entered on November 12, 1958.

2. The jurisdiction of this Court is invoked under U.S.C. Title 28, Section 1254.1, which authorizes review by the Supreme Court of cases in the Courts of Appeals by writ of certiorari.

Questions Presented for Review

The questions presented for review in this case are as follows:

Question No. 1

Did the Court of Appeals err in setting aside the following findings of fact by the District Court?

A

That plaintiff's injury occurred in an area of petitioner's said high-voltage line right-of-way which was not a "generally accessible place" within the meaning of that term as used in Section 232 of the National Electrical Safety Code.

B

That plaintiff's said injury on said high-voltage line was not one which petitioner reasonably should have anticipated would occur, either at the time said high-voltage line was erected by petitioner in 1931, or at the time plaintiff's injury occurred in June, 1956, as a result of petitioner maintaining the conductor in question at a vertical clear-

ance of fourteen feet six inches above the ground at the place of plaintiff's injury.

Question No. 2

Did said Court err in setting aside the following conclusion of law by the District Court?

"A"

That petitioner owed no common law duty to plaintiff, or any other person, under the circumstances, to erect and maintain the conductor in question at a higher level above the ground than fourteen feet six inches at the place of plaintiff's injury, and therefore there was no negligence on the part of petitioner in the manner in which petitioner maintained said conductor.

Question No. 3

Was the finding of the District Court that plaintiff was not guilty of contributory negligence, proximately contributing to his injury, clearly erroneous; and, if so, did the Court of Appeals err in refusing to reverse said finding of said District Court and in refusing to hold as a matter of law that plaintiff was guilty of contributory negligence, proximately contributing to his injury?

Regulation Involved

National Electrical Safety Code

(Tr. Vol. II, pp. 335-336)

Section 232. Vertical Clearance of Wires Above Ground or Rails. The vertical clearance of all wires above ground in *generally accessible places* or above rails shall (as to

open supply line wires and service drops conducting 750 volts to 15,000 volts) be not less than the following:

(1)	(Applicable to wires above rails)	
(2)	(Applicable to wires above rails)	
(3)	Public streets, alleys or roads in urban or rural districts	20 feet;
(4)	Driveways to residence garages	20 feet;
(5)	Spaces or ways accessible to pedestrians only	15 feet.

Statement of the Case

This is a removed civil action instituted in the Circuit Court of Wyoming County, West Virginia, on April 7, 1957, by C. C. McKinney, hereinafter referred to as plaintiff, against Appalachian Electric Power Company, hereinafter referred to as petitioner, to recover damages in the amount of $75,000.00 for personal injuries sustained by plaintiff on June 13, 1956, at the top of Corinne Mountain near the Community of Corinne Bottom in Wyoming County, West Virginia, when an aluminum TV antenna carried by plaintiff above his head on the end of a 10-foot long wood pole through and above undergrowth and down and across a 100-foot wide electric power line right-of-way of petitioner, contacted momentarily one of a group of bare conductors carrying 13,200 volts of electrical current and suspended by petitioner between wood poles at an elevation between fourteen feet six inches and fourteen feet two inches above the ground by plumb-line measurement at the point of contact. As a result of contacting said conductor, plaintiff sustained burns on his right hand, in which he was carrying said pole and a lead-in wire attached to said antenna, and left leg, the latter of which apparently has healed completely. At the trial, plaintiff contended that the burn on his right hand has totally and permanently disabled him

from engaging in his former occupation as a watch repairman as well as in all other occupations requiring the use of his right hand.

Plaintiff's action was predicated on the propositions that his injuries were sustained as a proximate consequence of: (1) petitioner's violation of Section 232 of The National Electrical Safety Code which required petitioner at the time of plaintiff's injury to maintain its high-voltage conductors, in the voltage range from 750 to 15,000 volts, at specified minimum "vertical clearances" above ground in certain therein enumerated "generally accessible places" on its right-of-way, and more specifically therein required that its conductors of that voltage range be suspended and maintained at a minimum vertical clearance of 15 feet above ground at places where such high-voltage conductors are suspended over "spaces or ways accessible to pedestrians only"; and (2) petitioner's failure to observe its common law duty to suspend and maintain its said 13,200-volt bare conductors on the said pole line at a substantially greater vertical clearance above ground than was maintained at the place of plaintiff's injury, sufficient to have avoided injury of the same general nature sustained by plaintiff, and which, in view of the pedestrian activity in the general area of plaintiff's injury, it reasonably should have anticipated would occur.

Petitioner removed this action on the ground of diversity of citizenship (U.S.C. Title 28, Section 1332) and filed its answer generally denying the allegations of plaintiff's declaration as well as asserting as an affirmative defense, plaintiff's own negligence as a proximately contributing cause of his injury. In answer to plaintiff's interrogatories and during the trial of the case, petitioner further contended (1) that the minimum vertical clearance requirement of Section 232 of said Code was not applicable to high-

voltage lines of petitioner suspended over the particular place on its said right-of-way where plaintiff was injured, because the place of plaintiff's injury was not a "generally accessible place" within the meaning of Section 232 of the Code; and (2) that there was no common law duty on petitioner to erect and maintain said high-voltage lines at a higher level above ground at the place of plaintiff's injury than fourteen feet six inches, the level at which it was maintained at the place and time of plaintiff's injury.

The case was tried before the District Court without a jury, for the reason that plaintiff did not demand a jury trial, and petitioner did not demand a jury trial within the time required by Rule 38 (b) (d).

At the conclusion of the trial, the learned district judge announced his decision and orally stated his findings of fact and conclusions of law which we fully set forth in the appendix to this petition (Appendix, App. 1, et seq.). Briefly stated, they are: (1) the place of plaintiff's injury was not a "generally accessible place" within the meaning of said Section 232 of the Code, and therefore, said Section 232 of the Code was not applicable to the high-voltage lines of petitioner suspended over the place on petitioner's right-of-way where plaintiff was injured and petitioner, therefore, was not under regulatory duty, and hence was not liable in damages for such failure to maintain the 13,200-volt conductor in question at a minimum vertical clearance of 15 feet above ground at that point; (2) plaintiff committed no negligent act or omission of duty proximately contributing to his injury; (3) petitioner was not, in the circumstances disclosed by the evidence, guilty of negligent disregard of a common law duty of care in failing to suspend and maintain the bare 13,200-volt conductor in question at an elevation above ground greater than fourteen feet six inches and fourteen feet two inches, shown to have

been maintained by petitioner at the place and time of plaintiff's injury; and (4) plaintiff sustained damages for his pain and disability attributable to his said injury in the sum of $7,500.00.

From a judgment of the District Court dismissing the action plaintiff appealed to the United States Court of Appeals for the Fourth Circuit, which rendered a judgment on November 12, 1958, reversing said judgment of the District Court, and remanded the case for a new trial.

Statement of the Facts

Prior to 1932 petitioner, in furtherance of its electric utility business in Wyoming County, West Virginia, constructed the two high-tension lines and the so-called Mullens substation located in Corinne Bottom, adjoining the coal mining community of Corinne, which are the subject of this litigation, about two hundred yards up Guyandotte River from plaintiff's store building, for the purpose of transmitting power from its Switchback station in McDowell County, reducing the voltage at the Mullens substation and then distributing the reduced current to coal companies and other bulk consumers throughout Wyoming County and part of Raleigh County. The two circuits in question, consisting of the Switchback-Mullens three phase transmission circuit carrying 88,000 volts and the Sagamore-Mullens three phase distribution circuit carrying 13,200 volts, extend in a general southerly direction from petitioner's Mullens substation in Corinne Bottom across Guyandotte River and State Highway No. 16 between Mullens and Beckley, and up to and around the summit of Corinne Mountain, which has an elevation in excess of 2,300 feet. These two high-voltage electric power lines leave the Mullens substation on double circuit steel high towers, the 88,000-volt circuit of three copper conductors

being located on the left or east side of the tower supports and the 13,200-volt circuit of three copper conductors located on the right or west side of the tower supports as the circuits extend from the substation to the south and over two such double circuit towers, each having six insulators to which the six conductors are attached, and continuing in a southerly direction cross the river and highway and ascend Corinne Mountain on an unfenced non-exclusive 100-foot wide right-of-way of petitioner, on land owned by Pocahontas Land Company, to another such double circuit steel high tower, referred to in the evidence as "Tower No. 2", located on a ridge midway up the mountain, about 800 feet distant from "Tower No. 1" (located in Corinne Bottom), the highway and river which skirt its base, and at an elevation of about 2,053 feet. This segment of petitioner's right-of-way on the mountain between the highway and Tower No. 2 is shown in Photo, Petitioner's Exhibit No. 3, and because of its steepness is seldom used by pedestrians except perhaps hunters and petitioner's right-of-way maintenance crews. There was no evidence that this segment of petitioner's right-of-way was ever used by TV system maintainers or that it was ever traversed by any TV transmission lines.

The two high-voltage circuits separate at Tower No. 2 though both continue south and on to the top of the mountain for a distance of about 900 feet and rising about 210 feet in elevation on substantially parallel courses but upon separate circuit supports located near the top of the mountain. Attached to Tower No. 2 are six insulators and six conductors (Photo, Plaintiff's Exhibit No. 3); whereas Tower No. 3 carries only three insulators and three conductors. (Photo, Plaintiff's Exhibit No. 2 and Petitioner's Exhibits Nos. 4 and 5.) The 88,000 volt three phase single circuit deviates slightly to the left and connects at the

top of the mountain to another steel tower, referred to in evidence as Steel Hightower No. 3. After leaving Tower No. 2, the 13,200 three phase single circuit deviates slightly to the right and connects to wood poles, which are much shorter than the steel towers, the first of which (referred to in the evidence as "Pole No. 30") is located about 140 feet below the crest of the mountain and the gap thereof through which the tower and pole circuits pass. From Pole 30 the 13,200 volt line extends for about 131 feet up the mountain to what is referred to in the evidence as "Pole 31", located a few feet below the mountain west of and about 75 feet below the location of Tower No. 3. The ridge on which the latter tower is located, runs in a generally east-west direction and sharply downhill from Tower No. 3, in a westerly direction, toward the 13,200 volt circuit extending between Poles Nos. 31 and 32, in the area of plaintiff's injury. For location of Tower No. 3 and Poles 30 and 31, see Photos, Plaintiff's Exhibit No. 2, and Petitioner's Exhibits Nos. 4 and 5.

Leaving Pole 31 (Photo, Petitioner's Exhibit No. 7) the three phase 13,200 volt circuit continues over the top of the mountain, parallel to and 40 feet west of the 88,000 volt circuit suspended on Tower No. 3 and beyond said tower for a distance of 181 feet to Pole 32 (Photo, Petitioner's Exhibit No. 10). Poles 31 and 32 are approximately 35 feet long and are set in the ground about six feet. The three conductors of the 13,200 volt circuit are suspended on the wood poles with the middle or highest conductor attached to two insulators on top of each pole, the other two conductors being attached to two insulators on each end of double crossarms bolted three feet from the top of said poles. It was on this 3-conductor span of 181 feet between Poles 31 and 32, crossing the top of the mountain, that plaintiff was injured, at a point about 50 feet south of Pole

31, when the TV antenna plaintiff was carrying on said 10-foot pole contacted the conductor on this 13,200 volt circuit which parallels closest to the 88,000 volt circuit on Tower No. 3, which plaintiff had passed on his way across petitioner's right-of-way on top of the mountain and traveling down the side thereof in a westerly direction toward the 13,200 volt pole circuit. The National Electrical Safety Code did not require that the 88,000 volt conductors of the 13,200 volt conductors be insulated or sheathed (Tr. Vol. II, p. 351). Located below the three conductors on the pole line were two telephone wires (Photos, Petitioner's Exhibits Nos. 7, 9 and 10) which were not energized because not in use by petitioner. Due to the steepness of the mountainside, about a 30° grade, when plaintiff got within a few feet of the conductor he later contacted, he was closer to it than he would have been standing directly thereunder. This fact is illustrated by the difference in two ground clearance measurements made by plaintiff about 10 days after his injury in an effort to ascertain the vertical clearance of said conductor. At the trial plaintiff and petitioner differed sharply as to the correct method for ascertaining the "vertical clearance" of the conductor within the meaning of Section 232 of said Code, plaintiff contending that vertical clearance means the shortest distance between the conductor and the ground or a measurement of ninety degrees to the plane of the ground, while petitioner contended that the correct method for ascertaining vertical clearance is to take a measurement from the conductor to a point on the ground directly thereunder (Tr. Vol. II, p. 378). The district court was of opinion that "the term vertical clearance means a straight line up and down" (Tr. Vol. II, p. 377). Extending a tape line from the conductor to the nearest point on the ground under and uphill from the conductor (not directly beneath

same), plaintiff obtained a measurement of 129". Extending a tape line from the conductor to a point on the ground directly under the conductor (plumb line) plaintiff obtained a measurement of 142". C. F. Mundy, petitioner's area supervisor, who testified that the grade of the mountainside where plaintiff contacted the conductor is 4', or more, made a plumb line measurement of 146" as the distance from the conductor to a point on the ground directly thereunder, and the district court found as a fact that the vertical clearance of the conductor was between 146" and 142". A profile map introduced in evidence (Petitioner's Exhibit No. 11) shows that the surface of the ground between Poles 31 and 32 is higher at the place of plaintiff's injury than "anywhere else along there" (Tr. Vol. II, p. 361).

Pertinent elevations are as follows: Corinne Bottom, 1450 feet; highway at foot of Corinne Mountain, 1502 feet; Tower No. 2, 2053 feet; Tower No. 3, 2260 feet; difference in elevation of Corinne Bottom and Tower No. 3, 810 feet. Said Tower No. 3, located near the summit of Corinne Mountain is about 1700 feet distant from Highway No. 16.

Said right-of-way, which is 100 feet wide throughout the distance pertinent to this case, was "cut over" by petitioner in December, 1954, and the undergrowth therein was cut to within six inches of the ground. Based on experience and practice petitioner has found that if the right-of-way is "cut over" every three years, that is sufficient to prevent the undergrowth from contacting the conductors on the pole line (Tr. Vol. I, p. 363). Carl Thompson, who was with plaintiff at the time of his injury, recalled seeing the right-of-way after it had been cleared of undergrowth in December, 1954, and stated that at that time, there was nothing to obstruct his view in the direction of Tower

No. 3 from a position in the tramroad where it crosses the right-of-way (Tr. Vol. II, p. 258).

In the vicinity of petitioner's right-of-way, Corinne Mountain is a heavily wooded, uninhabited area with frequent rock cliffs and precipitous declines (Photos, Petitioner's Exhibits 2 and 3). The only roadway thereon, if it can be called such, is a narrow "tramroad" which starts at the top of the mountain and "dead-ends" about midway down the mountain at an abandoned truck (coal) mine. It would be extremely hazardous to drive an automobile over and along this tramroad in rainy season or wintertime (Tr. Vol. II, p. 408). The tramroad is used mainly by petitioner's maintenance crews, using motor trucks and jeeps. The only family mentioned as living on the mountain—the Sizemores—reside about one mile from the place of plaintiff's injury. The only classes of pedestrians using the mountain, according to plaintiff's evidence, are seasonal berry pickers, hunters and TV cable system maintainers. Other than the tramroad and the footpath cut by plaintiff under his transmission line where it crosses the right-of-way, there are no well-defined footpaths across the right-of-way (Tr. Vol. II, p. 230).

In the summer or fall of 1953, plaintiff and Carl Thompson installed a TV transmission line or cable system (with electrical power supply line) on Corinne Mountain, extending about 2,500 feet from his store to an open spot about 1,000 feet east of Tower No. 3, where the connecting antennae were located, for the purpose of supplying a community antenna system for TV sets owned by his subscribers residing in Corinne Bottom. Shortly before his injury, plaintiff's cable system was carrying channels 3, 4, 6 and 11, the antennae therefor being grouped in close proximity on the mountain at the end of the cable. About 500 feet from the group of antennae and lower on the mountain,

plaintiff maintained a Channel 8 (Charleston) antenna, also carried by the cable. At the time of his injury, plaintiff's cable system served 16 subscribers residing in Corinne Bottom and he still owned the cable at the time of the trial. In the maintenance of the cable, plaintiff was on the mountain once a week (a total of about 100 times prior to his injury) during all seasons of the year. Plaintiff's TV cable, in common with some half dozen other TV cables, crossed petitioner's right-of-way down the mountain in a hollow or "swag" about 200 feet south of Tower No. 2 and the nearby trackroad. When going on the mountain plaintiff often would follow the trackroad in the vicinity of Tower No. 2 passing the point where he took the photograph marked Plaintiff's Exhibit No. 2, which clearly shows, above the undergrowth, Tower No. 3 with its three insulators and Pole 31 with its three insulators. Plaintiff had observed on Tower No. 2 metal signs imprinted: "Danger High Voltage" (Tr. Vol. I, p. 150).

On the day of plaintiff's injury, he and Carl Thompson left plaintiff's store about 9:00 o'clock A.M. to go on the mountain and remove the Channel 8 antenna from its present location and re-locate it at a place where a clearer signal could be obtained. After checking and inspecting the line along their usual route of passage up the mountain, they arrived at the Channel 8 antenna about an hour later. Removing the antenna from the metal mast to which it was attached, plaintiff cut a 10-foot pole and attached the antenna thereto and unsuccessfully attempted to get a satisfactory signal as he walked down the mountain in direction of Tower No. 3. During this maneuver he raised the antenna on the pole from 10 to 16 feet and turned it in direction (Tr. Vol. I, p. 82). We may assume that the field strength meter carried by Thompson was then attached to the antenna and that Thompson was watching

the meter for the signal. There was no defined path down the ridge from where he picked up the Channel 8 antenna to the point where he entered the right-of-way about 20 feet from Tower No. 3. Although the men got a satisfactory signal for Channel 8 at the testing point near Tower No. 3, they concluded that it would be advisable to locate a signal across and below the right-of-way on top of the mountain.

Plaintiff did not desire to locate the antenna in or near the right-of-way because of the possibility of getting a "reflected signal" from the power line (Tr. Vol. I, p. 118). Moreover, there were no trees in the right-of-way of sufficient height and thickness to support an antenna. When within about 20 feet of Tower No. 3 the men apparently paused and had a discussion as to where they would locate the antenna. While there, plaintiff warned Thompson to stay away from the tower because "I'm afraid of high voltage" (Tr. Vol. I, p. 151). Plaintiff knew that if he contacted a bare conductor carrying 13,200 volts he would receive a severe shock (Tr. Vol. II, p. 129). While there, they disconnected the lead-in wire from the field strength meter because they did not intend to try to obtain a signal while crossing the right-of-way, but left the wire attached to the antenna which remained on the pole. Neither plaintiff nor Thompson had ever been this close to Tower No. 3 and neither of them had ever crossed the right-of-way at this point. In fact, according to plaintiff's evidence, the only TV cable maintainers who ever crossed the right-of-way between Poles 31 and 32 were Roy Burgess and his two assistants, Burgess' antenna being in or near the right-of-way (Tr. Vol. II, p. 309). The antenna closest to Tower No. 3, owned by Charles Willing, was 50 to 75 feet from said tower.

Regarding his approach to the right-of-way, plaintiff

stated that "there was high trees just before you got to the right-of-way and the undergrowth wasn't so thick", but when he entered the right-of-way "the growth was very heavy and from ten to twelve feet high". He carried the pole, with antenna attached, in his right hand with the lead-in wire, connected to the antenna, "folded up" in his right-hand. That there was no path to follow is indicated by the facts that plaintiff had to use his left hand and arm to separate the undergrowth for his passage and that although he was only 15 feet in front of Thompson, Thompson could not see plaintiff due to the density and height of the bushes, but could see the antenna which plaintiff, height 5'9", was carrying on an angle above the bushes on the 10-foot pole (Tr. Vol. I, p. 231). When plaintiff reached a point about 40 feet below and west of Tower No. 3 and about 50 feet to the left and south of Pole 31, the antenna contacted the conductor in the manner described above and plaintiff was instantly rendered unconscious by the electrical shock thereby sustained.

C. F. Mundy stated that when he and Oscar Adams went on the mountain in the vicinity of Tower No. 3 and took the photographs and measured the vertical clearance of the conductor in question, about a month after plaintiff's injury, he made some observations from the base of Tower No. 3. He stated that standing on the ground at the base of said tower he could see Pole 31 and the lines attached to it (Mundy deposition, p. 32). Carl Thompson testified that while he did not see the conductor until he heard the spark caused by the contact by the antenna, had he been looking for the conductors on the wood poles he could have seen them "when I was ten to fifteen feet from them" and that had he been looking for Poles 31 and 32 he could have seen them. Plaintiff testified that had he been looking for Poles 31 and 32 as he crossed the right-of-way, he could have

seen them and could have seen the conductor he contacted when within 4 or 5 feet of it. But he did not observe the conductor prior to his injury. He could not recall that the undergrowth in the right-of-way was cut by petitioner's maintenance crews about a year after he constructed his transmission line.

The following salient facts were clearly established by the record. Prior to June 13, 1956, no person had ever been injured from electrical shock by coming in contact with any of the conductors on the steel tower line or the pole line on this segment of petitioner's right-of-way. None of the officials or employees of petitioner knew that the conductor contacted by plaintiff had a vertical clearance of less than 15 feet. There was no evidence that any TV cable system maintainer had ever attempted to obtain a signal by elevating an antenna above his head on a pole or mast in the right-of-way, under these high voltage lines. There was no evidence that any TV cable system maintainer, except plaintiff, had ever attempted to carry an antenna across the right-of-way above his head attached to a pole or mast. There was no evidence that any of the officials or employees of petitioner knew that the transmission line owned by Roy Burgess extended across the right-of-way between Poles 31 and 32. Plaintiff did not obtain permission from Pocahontas Land Corporation, owner of land in question on Corinne Mountain, to locate his antennae and transmission cable thereon, nor did he obtain permission from petitioner to maintain his transmission cable across its right-of-way.

The district court found that most of the antennae which were located on the mountain were at a distance of a thousand feet or more from the place of plaintiff's injury and that the closest antenna was 500 feet away (App. p. 60). Roy Burgess, the only witness we recall who described

how he attempted to obtain a signal off the right-of-way on one occasion, stated that before carrying the antenna across the right-of-way, he disconnected it from the mast (Tr. Vol. II, p. 318). Only two witnesses testifying for plaintiff stated that they had hunted on Corinne Mountain in the area of plaintiff's injury. One of said witnesses stated that he "through there one time this last season" (Tr. Vol. II, p. 284); the other witness stated that he had not "been up there this year" (Tr. Vol. II, p. 301). Although there was a suggestion that seasonal berry pickers visited the area, only *one* witness testified that he had ever picked berries in said area, and only plaintiff and four of his witnesses testified that they had constructed or maintained TV cable systems in the area in question. At the time of his injury the antenna which plaintiff was carrying was not connected to the field strength meter, and he was not then trying to obtain a signal. The "narrow road" mentioned in the decision of the Court of Appeals and referred to in this petition as a "tramroad" is located approximately 800 feet down the mountain from Tower No. 3, which is located about 50 feet from the place where plaintiff was injured.

Reasons for Granting the Writ

There are four special and important reasons for granting a writ of certiorari in this case:

(1) This case involves the construction of an important regulation of the National Electrical Safety Code (Section 232), which Code at the time of plaintiff's injury in June, 1956, had the force of statutory law in practically every state in the Union and governed construction and maintenance procedures of electric utilities throughout the country.

(2) The decision of the Court of Appeals conflicts with the rule stated in *Erie R. Co.* vs. *Tompkins* (1938), 58 S. Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, and subsequent similar cases decided by the Federal Courts, to the effect that except in matters governed by the Federal constitution or by Acts of Congress, the law to be applied in any Federal case is the law of the State where the cause of action arose, regardless of whether such law is statutory, or declared in the decisions of its highest court.

So far as we can ascertain, there is in West Virginia not a single case where liability has been upheld against an electric utility maintaining high voltage lines which could be contacted only at a place not readily accessible, or where the contact would require the use of artificial means. See: *Musser* vs. *Norfolk and Western Ry. Co.*, 122 W.Va. 365, 9 S.E. 2d 524, *Waddell* vs. *New River Company* (W.Va.) 93 S.E. 2d 473, *Craft* vs. *Fordson Coal Co.*, 114 W. Va. 295, 171 S.E. 886, and *Maggard* vs. *Appalachian Electric Power Co.*, 111 W.Va. 470, 163 S.E. 27, all of which cases we later will discuss in our argument.

(3) In setting aside the findings of fact made by the District Court, without holding that such findings were *clearly erroneous*, the Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual construction of Rule 52(a) of The Federal Rules of Civil Procedure, as to call for an exercise of this Honorable Court's power of supervision.

The law of West Virginia, as announced by its highest court, clearly and strongly supports petitioner's position with respect to negligence and contributory negligence, and clearly refutes the position and contention of plaintiff.

(4) A careful analysis of the decision of the Court of Appeals shows clearly that the sole basis of the decision, was the *feeling* of the Court that the District Court gave

"special emphasis" to the absence of avenues or paths over petitioner's right-of-way. However, the District Court *did not* give special emphasis to the absence of avenues or paths over petitioner's right-of-way, but in the course of his opinion, merely referred *one time* to the absence of avenues or paths, together with other facts showing that the area was not "generally accessible." Certainly the absence of paths, roads, ways, etc., across petitioner's right-of-way at the place of plaintiff's injury was a material factor, and *at least* entitled to some consideration.

Propositions Relied On to Reverse Judgment of Court of Appeals

A

The Court of Appeals erred in setting aside the finding of fact by the District Court that plaintiff's injury occurred in an area of petitioner's said high-voltage line right-of-way which was not a "generally accessible place" within the meaning of that term as used in Section 232 of the National Electrical Safety Code.

B

The Court of Appeals erred in setting aside the finding of fact by the District Court that plaintiff's said injury on said high-voltage line was not one which petitioner reasonably should have anticipated would occur, either at the time said high-voltage line was erected by petitioner in 1931, or at the time plaintiff's injury occurred in June, 1956, as a result of petitioner maintaining the conductor in question at a vertical clearance of fourteen feet six inches above the ground at the place of plaintiff's injury.

C

The Court of Appeals erred in setting aside the conclusion of law by the District Court that petitioner owed

no common law duty to plaintiff, or any other person, under the circumstances; to erect and maintain the conductor in question at a higher level above the ground than fourteen feet six inches at the place of plaintiff's injury, and therefore there was no negligence on the part of petitioner in the manner in which petitioner maintained said conductor.

D

The finding of the District Court that plaintiff was not guilty of contributory negligence, proximately contributing to his injury, was clearly erroneous, and the Court of Appeals erred in refusing to reverse said finding of said District Court, and in refusing to hold as a matter of law that plaintiff was guilty of contributory negligence, proximately contributing to his injury.

Inasmuch as the question of the applicability of Section 232 of the National Electrical Safety Code to the facts of this case depends on a proper construction of the phrases "generally accessible place" and "spaces or ways accessible", we enumerate some definitions of the words "generally" and "accessible" (we were unable to find any definitions of the phrases "generally accessible place" and "spaces or ways accessible"), as follows:

> "Generally. 1. In general; commonly; extensively, though not universally; most frequently, but not without exceptions. 2. In the main; without detail; in the whole taken together."
>
> Webster's 20th Century Dictionary (1936).

> "Generally. 1. widely; popularly; extensively; to or by most people: as, it is generally believed that he is innocent. 2. in most instances; usually, as a rule. 3. in a general way or sense; without reference to details or individual cases; not specifically."
>
> Webster's New World Dictionary (1957).

"Generally. 1. commonly; as a rule; 2. extensively; in the main; 3. without exact limitation; in a broad sense."

The Winston Simplified Dictionary (1938).

"Generally. 1. with respect to the larger part, or from the most part: *a claim generally recognized.* 2. usually; commonly; ordinarily: *he generally comes at noon.* 3. without reference to particular persons or things: *generally speaking.*"

The American College Dictionary (1951).

In *Interstate Motor Freight Corp.* v. *Belcher* (Ohio) 174 N.E. 27, the court held that "generally" has a broad meaning, and, as defined by Webster it has various meanings: "In a general manner; specif.: A. collectively; as a whole; without omissions. B. Universally. C. For the most part; commonly; extensively, though not universally; most frequently. D. In a general way, or in a general relation; in the main; upon the whole; comprehensively."

"Generality. 1. State or quality of being general. 2. That which is general; a general or vague statement or phrase. 3. *The main body; the bulk; the greatest part.*" (Italics supplied).

Webster's New Collegiate Dictionary (1956).

"Accessible. 1. *easy of access;* approachable. 2. attainable. 3. open to the influence of (fol. by to)." (Italics supplied).

The American College Dictionary (1951) Random House.

"Accessible. 1. *easy to reach or enter;* 2. capable of being approached; open to influence: with to; 3. attainable." (Italics supplied).

The Winston Simplified Dictionary
(Encyclopedic Ed. 1938)

"Accessible—1. that can be approached or entered. 2. *easy to approach or enter.* 3. that can be got; obtainable." (Italics supplied).

Webster's New World Dictionary (1957)
The World Publishing Company.

"Accessible—capable of being approached or reached; *easy of access;* approachable; attainable." (Italics supplied).

New Century Dictionary—Collier, 1944 Ed.

ARGUMENT

A

The Court of Appeals erred in setting aside the finding of fact by the District Court that plaintiff's injury occurred in an area of petitioner's said high-voltage line right-of-way which was not a "generally accessible place" within the meaning of that term as used in Section 232 of the National Electrical Safety Code.

Based on the above finding of fact, the District Court concluded that the requirement of Section 232 (5) that petitioner suspend and maintain its 750-15,000-voltage conductors at a minimum vertical clearance of 15 feet above the ground in "spaces or ways accessible to pedestrians only" was inapplicable to petitioner's high-voltage line at the place of plaintiff's injury.

We think the District Court was clearly right in construing this regulation as applying to places *generally accessible* to pedestrians and not limiting or restraining it to places *merely accessible* to pedestrians. A mere statement of the facts, without more, is sufficient to demonstrate that this finding of the District Court was clearly right. No other finding could properly have been made under the evidence.

It would be difficult to find in Wyoming County a place more isolated or generally inaccessible to the general public than the scene of plaintiff's injury. Located about 1700 feet distant from Highway No. 16, at an elevation of about 800 feet above Corinne Bottom on top of a heavily wooded mountain having frequent rock cliffs and precipitous declines, the ground under the span between Poles 31 and 32, where plaintiff was injured, was covered with saplings, shrubs and undergrowth so dense that it was necessary for plaintiff to use his left hand and arm to separate the bushes for his passage, and although he was only 15 feet ahead of Thompson when the antenna contacted the conductor, Thompson did not see plaintiff due to the density and height of the bushes. (Tr. Vol. I, p. 231.) Obviously, there were no well defined paths across the right-of-way at this point, and the narrow road mentioned in the opinion of the Court of Appeals passes near Tower 2, more than 800 feet from the place of plaintiff's injury. Despite the fact plaintiff and Thompson had been on the mountain weekly (about 100 times, since the construction of plaintiff's transmission line), they stated they had never before crossed the right-of-way at this point. There was no evidence that hunters or berry pickers ever crossed the right-of-way between Poles 31 and 32. In fact, plaintiff's evidence disclosed that the only persons ever to cross the right-of-way at this point were Roy Burgess and his two assistants, and that was because of the location of Burgess' antenna (Tr. Vol. II, p. 309). Clearly, the minimum vertical clearance requirements of the Code cannot be applied to all places along a rural right-of-way on top of a mountain, where the place of danger is isolated and infrequently used by pedestrians.

In the light of the above facts, let us now examine the decision of the Court of Appeals to ascertain whether said

Court erred in setting aside the above finding of fact by the District Court.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part as follows:

> "Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Italics supplied).

We respectfully submit that in reaching its decision, the Court of Appeals completely ignored the above rule of practice, for said Court does not state that said finding of fact was *clearly erroneous*, nor does the Court apply any of the accepted tests to determine whether said finding was clearly erroneous, such as a ruling that said finding was unsupported by substantial evidence, that it was contrary to the clear weight of the evidence, or that the Court had a definite and firm conviction that the District Court committed a mistake.

In his memorandum opinion, Judge Moore states: "I do not interpret the rule requiring a 15 foot clearance as applying to all places on the right-of-way that are not fenced in. I interpret that rule as applying to places that are not isolated and which are reasonably usable by people. I think that under the meaning of the regulation a generally accessible place is a place where people not only can go but where they may be expected to go, at least sometimes. . . . there were no avenues or paths that people could use to cross or recross the right-of-way under the lines and that, in fact, people did not use the general locality where the accident occurred for the purposes of going back and forth under the lines." (App. p. 59).

The only criticism by the Court of Appeals of the above statement is that in applying the statute to the above

facts, the District Court gave special emphasis to the "absence of avenues and paths" across petitioner's right of-way and that the Court was of opinion that this application of *the law* was erroneous because it insisted upon too high a degree of accessibility. (App. p. 69).

There are two obvious answers to this criticism: (1) The District Court *did not* give "special emphasis" to the absence of avenues or paths across petitioner's right-of-way, for *only once* in his opinion did he refer to the absence of avenues or paths across petitioner's right-of-way, at which time he also mentioned many other circumstances (which we will later enumerate) on which he based this finding. (2) In holding in effect that the area in question was not "generally accessible", the District Court was not making an application of *the law*; he was making a *finding of fact*.

Judge Moore, in his opinion, refers to the following facts as showing that the area in question was not "generally accessible":

(1) The locality was very steep.

(2) The area was grown up on both sides of the right of-way with heavy timber.

(3) The right-of-way was grown up with saplings 8 to 10 feet tall, (the evidence showed that it was also filled with underbrush).

(4) There were no paths or avenues across the right of-way in the area of plaintiff's injury.

(5) People did not use the general locality where the accident occurred for the purpose of going back and forth under the lines.

(6) One TV transmission line was built beneath the [illegible] pole line, but that was an isolated instance, and so far as the evidence showed, was unknown to the officials of the power company.

It is quite obvious from the above enumerated facts that the District Court did not place special emphasis on the absence of avenues or paths across petitioner's right-of-way; he merely took this fact into consideration along with the many other facts involved. However, was it improper for the District Court to refer to the absence of avenues or paths under petitioner's power lines? If so, why was it improper? Certainly, the absence of paths, roads, avenues, etc., across the right-of-way was *one* circumstance which should have been considered in determining whether the area was "generally accessible". Suppose there had been *many* paths and roads beneath the power lines and across the right-of-way. Would not plaintiff have been justified in pointing out and arguing that the many paths and roads across the right-of-way and beneath the power lines indicated that the area *was* accessible. This would indeed be a strong argument in plaintiff's favor, and on the other hand, the complete absence of paths, roads, avenues or ways across the right-of-way would be a strong argument in petitioner's favor. We submit that the absence of paths or roads across the right-of-way at the place of plaintiff's injury is very material in this case, because in heavily wooded country or in mountainous sections it is sometimes impossible to pass through the woods and underbrush except by roads or paths. *The roads or paths through the woods and underbrush are what make an area such as this accessible.*

The Court of Appeals further says: "Nor is the absence of well-defined roadways or paths controlling." We submit that the District Court did not say that this factor was controlling. He apparently took this factor into consideration (as he should have done) in making this finding of fact. We respectfully disagree with the statement of the Court of Appeals that "this application of *law* was erro-

neous", and we are at a loss to determine why the Court of Appeals stated that this was an application of the law when to us the conclusion is inescapable that the District Court was making a finding of fact.

In its opinion the Court of Appeals also states: "On the other hand, it (the word "generally") is not to be construed so narrowly as to limit the protection of the statute to places that are accessible to all classes of the public. * * * In this case there is uncontroverted testimony of activities of hunters and berry pickers on Corinne Mountain, and, in recent years, the increased utilization of the mountain for the maintenance of TV facilities."

However, the word "generally" is defined in the above quoted dictionaries as "the main body; the bulk; the greatest part." The word "generally" does not mean "all classes of the public." We submit that it means at the very least *a substantial number of the public*, and this definition is not as strong as found in some of the quoted dictionaries.

Although there was a suggestion that seasonal berry pickers visited the area, only *one* witness testified that he had ever picked berries in said area (Tr. Vol. II, p. 291), and only plaintiff and four of his witnesses testified that they had constructed or maintained TV cable systems in the area in question. Only two witnesses testifying for plaintiff stated that they had previously hunted on Corinne Mountain in the area of plaintiff's injury. One of said witnesses stated that he was "there one time last season" (Tr. Vol. II, p. 284); the other witness stated that he "had not been up there this year". (Tr. Vol. II, p. 304). Based on this meager evidence, the Court of Appeals nevertheless ruled that there was *substantial evidence* to support a finding that plaintiff was injured in a place within the meaning of the statute. It is significant to note that the Court of

Appeals did not say that there was no substantial evidence to support the above finding of the District Court.

The Court of Appeals further says: "We think that the statute applies not only to spaces or ways available to all members of the public; it is sufficient if a segment of the pedestrian public frequents the area." However, we contend that the evidence failed even to show that a *segment* of the public frequented this area. At the most, the evidence merely showed that it was *possible* for hunters, berry pickers and TV system maintainers to reach the area, and that possibly some of said hunters, berry pickers or TV system maintainers made infrequent visits to or near this particular area.

According to the opinion of the Court of Appeals, if a few hunters or berry pickers in years gone by had passed the locality of plaintiff's injury, then the place of the injury would be "generally accessible". The fallacy of this conclusion is manifested by our knowledge that some hunters and berry pickers will go anywhere at great risks to themselves. Certainly the fact that a hunter, a berry picker, or a TV system maintainer can reach a particular location does not indicate that such a location is "generally accessible" or even "accessible" in the accepted meaning of the word.

We also differ with another statement of the Court of Appeals: "Moreover, there is no suggestion that the mountain, and particularly the Tower 3 area, is not accessible on foot." True, the area in question is accessible on foot, but it is not "easy of access" or "easy to reach" as the word "accessible" is defined in the dictionaries. In fact, only a physically fit person could gain access to this area. Many women, older men and people in frail health could not even reach the scene of this accident on foot. Where, then, is the "substantial evidence" to support a finding that plaintiff

was injured in a place within the meaning of the statute? We contend that there is no substantial evidence to support such a finding and the Court does not inform us of the nature of the alleged substantial evidence. Furthermore, the Court of Appeals does not say that there was no substantial evidence to support a finding that the area in question *was not* "generally accessible", and if there was substantial evidence to support a finding that the area in question was not "generally accessible", then the Court of Appeals, adhering to said Rule 52 (a) of the Federal Rules of Civil Procedure, should have upheld the finding of the District Court. The Court of Appeals did not say that had it been sitting as District Judge it would have found differently from Judge Moore. The opinion of the Court of Appeals merely criticizes the finding of the District Court because he allegedly gave "special emphasis" to the absence of avenues or paths across petitioner's right-of-way, and says that the findings of the District Court were influenced, if not induced, by an erroneous interpretation of the statutory and common law duty of petitioner.

In summary, we contend that the common sense definition of the words "generally accessible", as applied in this particular case, means that the place where plaintiff was injured, to come within the statute, must have been "easy of access", or, "easy to reach or enter", and furthermore, that the place must have been frequented or used by at least a substantial number of the general public. It does not mean a distant, isolated, steep, precipitous, mountainous region covered with large trees, saplings, and dense undergrowth, where there are no paths, roads, ways, etc., and which is infrequently visited by hunters, berry pickers, and a half-dozen TV system maintainers. The regulation in question has the force of statutory law. It is plain and clear in its meaning and should be applied as written. The deci-

sion of the Court of Appeals emasculates the regulation and renders it meaningless.

We contend that the following authorities support our position that the Court of Appeals erred in setting aside the above finding under the evidence in this case and under the correct interpretation of Rule 52(a) of the Federal Rules of Civil Procedure.

> "While it is the duty of the Supreme Court of the United States to correct clear error, even in findings of fact, a choice by the trier of facts between two permissible views of the *weight of evidence* is not 'clearly erroneous', within the meaning of Rule 52 of the Federal Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous, as where in an anti-trust suit the evidence would support a conclusion either way but the trial court has decided it to weigh more heavily for the defendant." (Italics supplied).
>
> *United States* v. *Yellow Cab Co.* (1949), 70 S. Ct. 177, 94 L. Ed. 150.

> "The Supreme Court may, under the provisions of Rule 52(a) of the Rules of Civil Procedure that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous, reverse a finding of fact in an action so tried where, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."
>
> *U. S.* vs. *U. S. Gypsum Co.* (1948), 333 U.S. 363, 92 L. Ed. 746.

> "A trial court's finding of fact is clearly erroneous so as to justify the setting aside thereof by a reviewing

court, when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Syl. 2.

"On certiorari from a judgment of a Court of Appeals reversing a judgment of a District Court, the Supreme Court does not review the District Court, but reviews the Court of Appeal's review of the District Court." Syl. 6.

McAllister vs. *United States*, 348 U.S. 19, 99 L. Ed. 20, 75 S. Ct. 6.

"A trial court's finding of fact is 'clearly erroneous', so as to justify the setting aside thereof by a reviewing court, when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

U. S. vs. *Oregon State Med. Soc.* (1952), 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690.

"As a rule, the appellate court must give due regard to the opportunity of the trial court to judge of the credibility of the witnesses, and it is obliged to regard the findings as presumptively correct and may not disturb them or set them aside *unless they are clearly erroneous*, especially where the evidence is conflicting. So in the absence of *clear error*, the appellate court will not review or retry the facts, or weigh the evidence or pass on the credibility of witnesses to determine whether the facts were correctly found." (Italics supplied).

36 C.J.S. 409-412, Sec. 297 (3).

"Even where facts are undisputed, if different reasonable inferences may fairly be drawn from evidence, an appellate court is forbidden to disturb findings based on such inferences unless they are 'clearly erroneous'."

Tennessee Coal, Iron & R. Co. v. *Muscoda Local No. 123, etc.*, 137 F. 2d 176, denying rehearing 135 F. 2d 320, modifying 40 F. Supp. 4, affirmed 64 S. Ct. 698, 321 U.S. 590, 88 L. Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S. Ct. 1257, 322 U.S. 771, L. Ed. 1596.

"Even though the Circuit Court of Appeals *may be in disagreement* with the District Court's findings on a question which is solely one of fact, the Circuit Court of Appeals is required to accept the District Court's findings unless clearly erroneous." (Italics supplied).

Blytheville Cotton Oil Co. v. *Kurn* (CCA, 6th—1946), 155 F. 2d 467.

"That the trial court could have viewed the facts differently, or that we might perhaps have done so, if we had been the initial trier thereof, does not alone entitle us to reverse. Under Rule 52 (a) and its interpretation in the *United States Gypsum Co.* case, *there must exist a stronger basis for over-throwing a finding of fact than a mere difference in personal judgment.* Such evidentiary weight and such convictional certainty must be present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound survey of or to accord the proper effect to all the cogent facts, giving due regard, of course, to the trial court's appraisal

of witness credibility where the factor is involved." (Italics supplied).

Nee v. *Linwood Securities Co.* (CCA, 8th—1949), 174 F. 2d 434, 437.

"Where different inference could be drawn from evidence and District Court might well have reached a different conclusion, Circuit Court of Appeals could not declare that District Court's findings were clearly erroneous."

Bostian v. *Levich* (CAA, 8th—1943), 134 F. 2d 284.

Where a case is tried by the Court, a jury having been waived, the District Court's findings upon questions of fact are conclusive upon appeal, no matter how convincing the argument that upon the evidence the findings should have been different, *unless there is no substantial evidence to support them,* and the appellate court is bound by the lower court's findings unless they are *clearly erroneous.*

Storley et al. v. *Armour & Co.* (CCA, 8th—1939), 107 F. 2d 499;

Sundt v. *Turman Oil Co.* (CCA, 5th—1939), 107 F. 2d 762;

Webb v. *Frisch* (CCA, 7th—1940) 111 F. 2d 887;

Reinstine v. *Rosenfield* (CCA, 7th—1940), 111 F. 2d 892;

Occidental Life Ins. Co. v. *Thomas* (CCA, 9th—1939), 107 F. 2d 876;

McGee v. *Nee* (CCA, 8th—1940), 113 F. 2d 543;

Continental Oil Co. v. *Jones* (CCA, 10th—1940) 113 F. 2d 557;

Corbett v. *Halliwell* (CCA, 2nd—1941), 123 F. 2d 331;

United States v. *State Street Trust Co.* (CCA, 1st—1942), 124 F. 2d 948;

Andrew Jergens Co. et al. v. *Conner* (CCA, 6th—1942), 125 F. 2d 686;

Gasifier Mfg. Co. v. *General Motors Corp.* (CCA, 8th—1943), 138 F. 2d 197;

Travelers Mut. Casualty Co. v. *Rector* (CCA, 8th—1943), 138 F. 2d 396;

Smith v. *Porter* (CCA, 8th—1944), 143 F. 2d 292.

B

The Court of Appeals erred in setting aside the finding of fact by the District Court that plaintiff's said injury on said high-voltage line was not one which petitioner reasonably should have anticipated would occur, either at the time said high-voltage line was erected by petitioner in 1931, or at the time plaintiff's injury occurred in June, 1956, as a result of petitioner maintaining the conductor in question at a vertical clearance of fourteen feet six inches above the ground at the place of plaintiff's injury.

The above finding was amply supported by the following facts: (1) Plaintiff's evidence failed to disclose that any of the hunters or berry pickers using Corinne Mountain had ever crossed petitioner's right-of-way at the place of plaintiff's injury; (2) The inaccessibility of the locality around Tower 3 and Poles 31 and 32; (3) Prior to June 13, 1956, no person had ever been injured from electrical shock by coming in contact with any of the conductors on the steel tower line or the wood pole line on this segment of petitioner's right-of-way; (4) the only TV cable maintainers ever to cross the right-of-way at the place of plaintiff's injury were Roy Burgess and his two assistants; (5) the Burgess transmission line was the only such line

that crossed the right-of-way between Poles 31 and 32, unbeknownst to any of the officials or employees of petitioner; (6) none of the officials or employees of petitioner knew that the conductor in question had a vertical clearance of less than 15 feet; (7) no TV cable system maintainer had ever attempted to obtain a signal by elevating an antenna above his head on a pole or mast in the right-of-way, under these high tension lines; (8) and no TV cable system maintainer, except plaintiff, had ever attempted to carry an antenna across the right-of-way above his head attached to a pole or mast.

In view of the above facts, how can it be contended with any plausibility that petitioner owed plaintiff a duty of prevision?

In his opinion the District Judge calls attention to several of the above important facts. How, then, can the Court of Appeals state with any justification that, "the District Judge was *undoubtedly* influenced, as he evidently was in applying the statute, by an undue constriction of the term 'accessible'." (Italics supplied). But here again the District Court made a finding of *fact*, not a conclusion of *law*. We therefore submit there is no valid basis for the conclusion of the Court of Appeals that the District Court's finding on this question was influenced by an undue constriction of the term "accessible."

Where is the basis for the criticism by the Court of Appeals that "the Court's findings were influenced, if not induced by an erroneous interpretation of the statutory and common law duty of the defendant"? In support of this conclusion, the Court of Appeals cites *Clea Syrup Corporation* v. *Coca-Cola Co.*, 139 F. 2d 416, 418 (8 Cir., 1943), cert. den. 321 U.S. 781 (1944); and *Carpenter* v. *Ohio River Sand & Gravel Corp.*, 134 W. Va. 587, 60 S.E. 2d 212, 215 (1950).

The *Cleo Syrup* case, which, of course, is not in point on the facts, and there the findings of the lower court were sustained by the Court of Appeals, holds that "this court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court (citing cases). The power of the trial court to decide doubtful issues of fact is not limited to deciding them correctly (citing cases). In a non-jury case this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of evidence, or unless it was induced by an erroneous view of the law."

Clearly, in the case at bar, there is substantial evidence to sustain the above finding and it obviously is not against the clear weight of the evidence.

The *Carpenter* case, which also is not in point on the facts, holds that it is reversible error for the trial court to disregard competent and credible evidence and misinterpret the law applicable thereto.

We submit that the District Court did not disregard competent evidence and that he did not misinterpret the law applicable thereto in making the above finding of *fact*.

Love v. *Virginian Power Co.*, 86 W. Va. 393, 103 S.E. 352, cited by the Court of Appeals for the proposition that the extent of pedestrian use of the surrounding area and the likelihood that someone might cross petitioner's non-exclusive right of way and thereby become exposed to danger, bear upon the element of foreseeability, is clearly distinguishable from the instant case.

The *Love* case was an action to recover for the death of a 7-year-old infant who was killed when he came in contact with defendant's uninsulated high-voltage conductor which extended within 4 feet of the top of a slag pile on which said infant was playing. Said infant was the son of a deceased

coal miner who had worked for the coal company which owned the land over which defendant's lines extended under an agreement with defendant in which defendant recognized the paramount rights of the coal company. Said infant resided in the same house on coal company property in which his father had resided prior to his death. The declaration alleged that children had been playing on the slag pile for a period of two years prior to the injury with the knowledge of the defendant.

Overruling a demurrer to the declaration, the court held that the relation in which the employees of the coal company and their children stood toward defendant while upon its unfenced right of way *was of a higher and different nature than that of a trespasser or a bare licensee.*

Since, in the instant case plaintiff was a trespasser or at most a bare licensee, petitioner did not owe him as high a duty to anticipate possible injury to him as did the defendant in the Love case where plaintiff's decedent resided on the property on which defendant's power line right of way was located.

Our position on the question of foreseeability of the danger of plaintiff contacting the conductor in question is supported by the general rules stated in American Jurisprudence as follows:

> "Where an electric company maintains its wires at a height at which they would not come into dangerous proximity to such persons or things as it *reasonably ought to anticipate* might rightfully come under or near them, it is not chargeable with negligence because someone doing an act *which it has no reason to expect*, suffers an injury which might not have been sustained if the wires had been higher." (Italics supplied).
>
> 18 Am. Jur. 487, Sec. 94.

"The negligence of an electric company cannot, according to the generally accepted test, be said to be the proximate cause of an injury within the law of negligence unless, under all the circumstances, the injury might have been reasonably foreseen by a person of ordinary intelligence and prudence; it is not enough to prove that the injury is a natural consequence of its negligence. *It must also have been the probable consequence.* (Italics supplied).

18 Am. Jur. 448, Sec. 53.

C

The Court of Appeals erred in setting aside the conclusion of law by the District Court that petitioner owed no common law duty to plaintiff, or any other person, under the circumstances, to erect and maintain the conductor in question at a higher level above the ground than fourteen feet six inches at the place of plaintiff's injury, and therefore there was no negligence on the part of petitioner in the manner in which petitioner maintained said conductor.

In the case at bar, the most that can be said of the evidence favoring plaintiff, is that petitioner, through its employees, knew that various persons were locating their TV antennae on Corinne Mountain (but not in the right-of-way of petitioner) and extending their transmission lines across the right-of-way in the vicinity of Tower No. 2 where all power lines are much higher above ground than required by the Code. There was nothing to put petitioner on notice that TV cable maintainers were locating their antenna in the right-of-way and were carrying same above their head on poles or masts at heights in excess of 14 feet. The District Court found as a fact that the closest antenna to the place of plaintiff's injury was 500 feet distant; that there

was only one isolated instance of a TV transmission line (owned by Burgess) crossing the right-of-way in the area of plaintiff's injury; and, further, that the evidence failed to disclose that the officials or employees of petitioner had knowledge of the location of such transmission line. Although plaintiff had been on the mountain about 100 times since he located his transmission line thereon, averaging one-trip weekly, he had never observed a single TV cable maintainer attempting to obtain an antenna signal in the right-of-way nor had he observed any such maintainer *crossing the right-of* way carrying an antenna above his head on a pole as plaintiff did at the time of his injury. If these acts had never occurred to his knowledge during the three-year period in question, and certainly he was on the mountain much more frequently than the employees of petitioner, how can he successfully contend that petitioner should have foreseen that plaintiff might be injured while performing an act which, according to the evidence, had never before occurred. Plaintiff's witness, Roy Burgess, stated that on one occasion he attempted to obtain a signal about fifty feet from the east side of the right-of-way; that on that occasion he attached his antenna to two joints of aluminum pipe and elevated the antenna "about 28, 29 feet" (Tr. Vol. II, p. 316), but failed to obtain an adequate signal and that before crossing the right-of way *he and his uncle detached the antenna from the mast*, and he (Burgess) carried the antenna, which was larger and wider than a Channel 8 antenna, unassisted through the undergrowth across the right of way. Therefore, the only witness produced by plaintiff to testify that he ever carried an antenna across the right-of-way in the area of plaintiff's injury, stated that he disconnected the antenna from the mast before crossing the right-of way. It is therefore apparent that plaintiff failed signally to disclose one instance,

besides his own ill-fated trip, when any person carried an antenna across the right-of-way as he did on that occasion, or that any one had ever attempted to obtain an antenna signal in the usual manner in the right-of-way.

In this case there is no substantial evidence that the conductor in question was not originally placed at the proper height of 15 feet above ground by vertical clearance measurement. That these conductors on the pole line had been electrified and carried high voltage for about 25 years prior to plaintiff's injury, which the evidence shows to have been the first and only injury of any nature resulting from electrical shock on this segment of petitioner's right-of-way, clearly shows that petitioner could not have reasonably anticipated that the conductor in question was dangerous to TV system maintainers.

Due to the contour of the ground between Poles 31 and 32, it is understandable that the employees of petitioner were unaware that the conductor in question was less than 15 feet above ground at the place in question. Even though said conductor may have been located at proper heights on Poles 31 and 32, to obtain, under usual contour conditions, a minimum vertical clearance of 15 feet above ground, it is quite plausible that said clearance was less than 15 feet because of the contour of the ground. Lloyd B. Lee, petitioner's district superintendent and an engineer, stated that according to the profile map (Petitioner's Exhibit No. 7) the high point of the ridge is between Poles 31 and 32 and that the ground at the base of the poles is lower than the ground in the middle of the span. (Tr. Vol. II, p. 362).

If it be conceded that petitioner should be deemed to have foreseen that TV cable maintainers would attempt to locate antenna signals in the right-of-way in the manner

described in the record or carry an antenna across the right-of-way in the manner of plaintiff at the time of his injury, what alterations in the elevation of its power lines along this segment of the right-of way should have been made by petitioner? Should the minimum vertical clearance of the pole have been increased to 20, 25 or 30 feet? Plaintiff stated that when he obtained an adequate signal before crossing the right-of-way, he raised the antenna on the pole to an elevation between 10 and 16 feet. Roy Burgess stated that on the occasion mentioned above when he attempted to obtain a signal east of the right-of-way, he elevated his antenna on a metal mast to about 30 feet above ground (Tr. Vol. II, p. 316). The District Court found that the height of the stationary antennae varied from 6 to 8 feet up to as much as 25 or 30 feet. If petitioner were required to increase the elevation of the conductor in question to as much as 30 feet, it is obvious that the type of wood pole presently used in this right-of-way would be inadequate. There was no evidence on the question, hence we cannot say whether petitioner could feasibly dispense with the pole line (a distribution line) and replace it with a steel tower line, which is ordinarily a transmission line, for the protection of TV cable maintained utilizing Corinne Mountain as a mast for their antennae.

We strenuously contend that even though seasonal berry pickers and hunters may have infrequently visited the area of plaintiff's injury, as contended by plaintiff, such situation would not have required petitioner to have anticipated plaintiff's injury, for hunters and berry pickers could have passed under this conductor with safety. Plaintiff, also, could have passed under the conductor with safety, had he disconnected the antenna from the pole and carried it separately across the right-of-way as Burgess did. Moreover, there is no evidence that the conductor in question,

at any other point on the pole line, had a vertical clearance of less than 15 feet above ground.

1

The Rule in West Virginia Apparently Is That One Maintaining Electrical Wires Which Can Be Contacted Only at a Place Not Readily Accessible Or Where the Contact Would Require the Use of Unusual Artificial Means Is Not Liable for Injuries to One Contacting Such Wires.

"It is common knowledge that electricity is a dangerous instrumentality. And a company transmitting electricity of high voltage is required to exercise a high degree of care not to injure others. This high degree of care is a care *commensurate with the danger of the instrumentality*, and if the failure to exercise such care results in injury to persons or property, a legal liability follows.

"But such high degree of care is only reasonable and is to be determined by the usage and custom prevailing among electric power companies. And the law does not exact as high degree of care in the maintenance of dangerous machinery or appliances in an *unfrequented place*, as it does in the maintenance of such things along or across public highways. So the danger of the situation is to be specifically considered by the jury in determining the measure of the defendant's care." (Italics supplied.)

6 Michie's Jurisprudence Sec. 10, pp. 659-660.

In *Musser* v. *Norfolk and Western Ry. Co.*, 122 W. Va. 365, 9 S.E. 2d 524, our Court held that where a catenary wire system of an electrified railway running under a highway bridge was so placed that a person standing on

the bridge and reaching over the parapet could not touch the wires by at least nine feet, *except by artificial means*, that railway company was not liable for death of a 13-year-old boy who, while crossing the bridge swung a chain over the side of the parapet and brought it in contact with high-voltage wires.

After reviewing the W. Va. cases involving liability growing out of the use of electric wires, Judge [illegible] speaking for the Court, makes the following statement:

> "There is, however, in this jurisdiction not a single case where liability has been upheld against one maintaining electrical wires which could be contacted only at a place *not readily accessible or where the contact would require the use of unusual artificial means.*" (Italics supplied).

And in conclusion:

> "We do not think that the defendant here *reasonably could have anticipated* that this boy would have and use a chain at least eight or nine feet long to contact its wires, no more than it could anticipate that a boy would throw a wire over its uninsulated trolley wires. In cases involving the latter state of facts, it is generally held that the maintenance of uninsulated overhead wires is not actionable, (citing cases). Because neither the Court nor a jury, under the facts of the instant case, could reasonably say that anyone would have acted as decedent did, we are prompted to hold that the record here does not indicate a lack of care commensurate with the risk and therefore defendant is in no way liable for decedent's death. *The fact that these wires had been electrified and contained high voltage for fifteen years prior to the accident without injury to anyone, confirms us in our*

belief that defendant could not have reasonably anticipated that the wires in question were dangerous to persons passing to and fro across the bridge." (Italics supplied).

In *Maggard* v. *Appalachian Electric Power Co.*, 111 W. Va. 470, 163 S. E. 27, plaintiff, an employee of a construction company, engaged in excavating a public road under defendant's high-tension wire located on private property, was injured when he contacted one of said wires when he climbed the boom of a steam shovel which at the time was almost perpendicular, and threw the cable from the shovel wheel to give the proper slack to the cable. The wire with which plaintiff came in contact was about 32 feet above the fill on which the shovel was working. Pursuant to the request of the construction company, defendant had relocated one of its poles and raised the wires approximately 34 feet above the ground to the apparent satisfaction of the construction company.

In reversing a judgement for plaintiff, the Court made the following pertinent statements:

"The crux of this case is whether, under the facts and circumstances here set out at length, defendant was bound to anticipate that the end of the boom would be negligently brought to rest dangerously near the wires, and that plaintiff would be sent to the apparent danger of electrocution. The law does not make an electric company an insurer against injury *from its high-tension wires. If so, it would be required to insulate them in uninhabitated places where persons might go in pursuit of pleasure, or other purposes.*

. . . . . .

"But where the wires are at a height in the air at which they would not come in contact or dangerous

proximity to persons *not reasonably expected to come near them*, the owner or operator of the lines is not chargeable with negligence where someone, doing an act *which he had no reason to expect or anticipate*, suffers an injury which might not have been suffered if the wires had been at a higher elevation."

. . . . . .

"On the whole, we have come to the conclusion that defendant could not reasonably anticipate the injury to plaintiff and no legal duty rested upon it *to insulate its wires at that place or raise them higher*." (Italics supplied).

In *Waddell v. New River Company* (W.Va.), 93 S. E. 2d 473, defendant coal company owned and maintained in an uninhabited, wooded area of its property, difficult of access, a power pole to which were attached uninsulated wires carrying 2,300 volts of electricity, such pole being situate 1385 feet from plaintiff's dwelling house and 1525 feet from the nearest road; the pole was guyed by two approximately parallel guy wires, one directly over the other, the distance between such wires ranging from approximately 4 feet near the ground to 6 feet at the pole; the pole was constructed, guyed and maintained in accordance with the best usage and practice of the electric industry; children had played in the general vicinity of the pole and there were no warning signs nearby. Plaintiff, a boy fourteen years and seven months of age, traversed the distance from his dwelling to the pole, climbed approximately 30 feet up the guy wires to a point nearly 24 feet above the ground, then reached over a distance of 2 feet and grasped one of the uninsulated conductors, seriously injuring himself.

Our Supreme Court, notwithstanding a verdict and judgment for plaintiff, held that such evidence was insufficient, as a matter of law, to be submitted to a jury upon the question of defendant's primary negligence.

The Court apparently makes a distinction as to where electric wires are in easy reach and where they can be reached only with the aid of artificial means, holding that in the former case the issue as to liability becomes at least a jury question.

Even though the instrumentality is dangerous, said the Court, the operator thereof in the exercise of care commensurate with the circumstances is not required to foresee or anticipate *extremely unusual happenings.*

> "It is clear from the evidence in this case that the power line of the defendant, at the place where the plaintiff was injured, *ran through a wooded, uninhabited area, and that it was constructed and maintained in accordance with the best usage and practice of the electrical industry.* It is true that upon cross-examination, one or more of the witnesses for the defendant admitted that it would have been possible to separate the guy wires by a greater distance, making accessibility to the wires charged with electricity more difficult by having installed what was referred to as a stub pole, and attaching to the stub pole another guy wire which would also run into the ground to the rear of it. However, this Court held in the Musser case, supra, that: 'Even if the instrumentality is dangerous, care need be taken only in a degree which is commensurate with the circumstances and such duty to exercise care does not require the operator of a dangerous instrumentality to foresee or anticipate *extremely unusual happenings.*'" (Italics supplied).

While There Are Some Cases to the Contrary, the General Rule in Other Jurisdictions Apparently Is That a Utility Company Is Not Liable for Injuries Sustained by One Using Artificial Means to Contact its High Tension Wires at a Place Not Readily Accessible, Or Where the Wires Could Have Been Contacted by Such Person Only by the Use of Such Artificial Means.

"Where an electric company maintains its wires at a height at which they would not come into dangerous proximity to such persons or things as it reasonably ought to anticipate might rightfully come under or near them, it is not chargeable with negligence because someone doing an act which it has no reason to expect, suffers an injury which might not have been sustained if the wires had been higher."

18 Am. Jur. 487, Sec. 94.

See, also, *Rudd* v. *Public Service Company of Oklahoma* (U.S.D.C.N.J. Okla.), 126 F. Supp. 722; *West Texas Utilities Co.* v. *Harris* (Tex.), 231 S.W. 2d 558; *Hale* v. *Montana-Dakota Utilities Co.* (C. C. A., S.D.), 192 F. 2d 274; *Jowett* v. *Penna. Power Co.* (Penna.), 118 A. 2d 452; *Salt River Valley Water Users' Assn.* v. *Compton* (Ariz.), 8 P. 2d 249; and *Nicolai* v. *Wisconsin Power & Light Co.*, 277 N.W. 674.

We were unable to ascertain from a careful reading of plaintiff's brief filed in the Court of Appeals that he cited a single case involving personal injury sustained as a result of a TV antenna contacting a high-tension wire, wherein the Court imposed liability on the owner of the power line, under circumstances similar to those in the case at bar. We, too, in our extensive research were unable to find such a case.

The cases most nearly in point which we found are: *Carr v. Kentucky Utilities Company* (Ky.), 301 S.W. 2d 894; *Johnson v. Johnson City* (Tenn.), 292 S.W. 2d 794; and *Antonelli v. Ohio Edison Co.* (Ohio), 121 N.E. 2d 560.

In the *Carr* case, the Appellate Court sustained the action of the Trial Court in directing a verdict for the utility company which had been sued for damages for electrocution of plaintiff's decedent when a television antenna being raised by decedent on defendant's right-of-way contacted a high tension wire located on the side of a mountain, on rough terrain which was utilized by inhabitants of a nearby community for walking, hunting, gardening and kindling gathering, on the ground that decedent was contributorily negligent as a matter of law.

While in that case the regulation in question apparently was not involved, the following statement of the court is pertinent:

> "The owner of extra hazardous instrumentalities is under a duty to use extreme care in their operation. (Citing cases) Omniscience, however, is not demanded, nor anticipation by reasonable men. *The presence of hunters and walkers, even picnickers and possibly gardeners, might reasonably have been known, even though they were trespassers on the Coal Company's land.* But to require that Kentucky Utilities should have also anticipated a deliberate attempt to place an antenna within inches of its lines is to impose too onerous a burden upon it. Notice that in the past several antennas had been placed near their lines would not amount to notice that someone would purposely place himself in so precarious a position. * * *"

In the *Johnson* case, which was an action for injuries from electric shock when a television test antenna being raised by plaintiff in the yard of a prospective customer for a television set, came in contact with a high voltage uninsulated power line of defendant city's electrical transmission system, the Court held that the evidence was insufficient to take to the jury the question of defendant's negligence in transmitting electric current over an uninsulated wire too close to the ground for safety and failing to post warnings of its presence, and that the evidence established as a matter of law plaintiff's negligence in raising the antenna in close proximity to the line, with knowledge of such fact, and failing to ground the antenna cart.

In the *Antonelli* case, which was an action for the death of a television dealer's employee who was electrocuted when the antenna he was installing came in contact with the uninsulated high voltage wires of a public utility corporation, although defendant's wires were not insulated, were only eight feet (laterally) from the residence, were farther than normal distance from the highway, *and were partly obscured by trees*, the Court held that the evidence of negligence on the part of defendant was insufficient for the jury.

For related cases (not involving injury from erection of TV antennae) denying liability on the part of an electric company owning and maintaining high tension lines, for injury to persons contacting said lines by artificial means, see:

Stark v. Lehigh Foundries (Penna.), 130 A. 2d 123;

Stasulat v. Pacific Gas & Electric Co. (Calif.), 67 P. [illegible] 678;

Arkansas Power & Light Co. v. Lum (Ark.), 262 S.W. 2d 920.

D

The finding of the District Court that plaintiff was not guilty of contributory negligence, proximately contributing to his injury, was clearly erroneous, and the Court of Appeals erred in refusing to reverse said finding of said District Court, and in refusing to hold as a matter of law that plaintiff was guilty of contributory negligence, proximately contributing to his injury.

A brief recital of the evidence which we feel conclusively convicts plaintiff of contributory negligence follows: Plaintiff, age 43, a businessman, an electrician of sorts, had resided in Corinne Bottom about 10 years in plain view of petitioner's substation and steel Towers 1 and 2. Plaintiff knew that the right-of-way of defendant on Corinne Mountain was about 100 feet wide and was lined or bordered by large trees, with undergrowth 8 to 10 feet high in the right-of-way as shown by Photos, Plaintiff's Exhibit Nos. 2 and 3, and Petitioner's Exhibit Nos. 3 and 7. Plaintiff had done electrical wiring in his home and store and some knowledge of electricity was required to install his transmission line and power supply line with its "boosters", "mixers", etc. Plaintiff was well aware that if he contacted a conductor carrying 13,200 volts he would sustain a severe shock. While he asserted he was not aware that the pole line was in the west portion of the right-of-way at the top of the mountain, he admitted on cross-examination that prior to his injury he had observed that Tower 2 supported six conductors, but that he was not aware of the number of conductors on Tower 3, notwithstanding his photograph No. 2 and Petitioner's photographs Nos. 4 and 5 clearly show that Tower 3 supports three insulators. However, plaintiff's photograph No. 2, taken from the tramroad about 10 days after his injury clearly shows, de-

spite the undergrowth, that Tower 3 supports three insulators and that Pole 30, the first wood pole to which the three conductors of the 13,200 volt line attach after leaving Tower 2, supports three insulators. Plaintiff testified that when inspecting his cable he would sometimes follow the tramroad near Tower 2 at the spot from which he took photograph No. 2, and that as he passed that spot he could see just what said photograph shows (Tr. Vol. I, p. 134). During the winters of 1953, 1954 and 1955, plaintiff averaged at least one trip weekly on the mountain, crossing the right-of-way in the vicinity of the tramroad and Tower 2 (Tr. Vol. I, p. 134), and petitioner's photographs Nos. 4 and 5, taken in December, 1957, in absence of foliage, clearly show not only Poles 30 and 31 but also the three conductors attached thereto. C. F. Mundy testified that standing on the ground at the base of Tower 2, when he visited the scene of plaintiff's injury in July, 1956, he could see Pole 31 and the lines attached to it. Carl Thompson testified that had he been looking for Poles 31 and 32 he could have seen them as they started across the right-of-way and that he could have seen the conductor in question when within 10 to 15 feet of it; he asserted however that he did not, on the occasion of plaintiff's injury, see Poles 31 and 32, and did not see the conductor until he heard the spark caused by the contact with the antenna. Thompson recalled the right-of-way had been cleared of undergrowth in December, 1954, and that at that time there was nothing to obstruct his view, looking south toward Tower 3 and Pole 30, from a position in the "swag" where the tramroad crossed the right-of-way. Thompson further stated that it would have been "relatively easy" for plaintiff to have disconnected the antenna from the pole and carried said antenna across the right-of-way. A few weeks after the accident plaintiff told Starlin Litteral, petitioner's crew foreman, in response to

Litteral's question, didn't plaintiff know the line was there, *that he knew it was there, but he didn't know it was that close* (Tr. Vol. II, p. 415). Plaintiff contacted the conductor when he was less than halfway across the right-of-way.

From the above evidence we feel the Supreme Court must conclude that the District Court clearly erred in finding that plaintiff was not contributorily negligent. Plaintiff was very careful to avoid any admission of any knowledge of the existence of the pole line in the vicinity of his injury or that he was aware that the right-of-way had been "cut over" by petitioner in December 1954. Certainly, in December, 1954, there was no undergrowth in the right-of-way from a position on the tramroad in the vicinity of Tower 2 which would have obstructed his view to the south of Tower 3 and Pole 30 with conductors attached thereto. And we strenuously insist that even during the winter months of 1955 there was nothing at this point to obstruct his view of said tower and poles *and the conductors attached thereto* as is clearly shown by Petitioner's Exhibits Nos. 4 and 5. Will this court permit plaintiff to say that he did not see these objects which were clearly visible? Most certainly not. The law in this regard is well settled in West Virginia:

> "One may not wantonly project himself into a dangerous situation, no matter how serious the dereliction of the other party, and where a person realizes or *should reasonably realize* that the actions of another have created a dangerous situation, there is a duty to avoid the consequences of that situation. The law ordinarily charges a person of unimpaired vision with seeing an object which, if he had used his senses, he in the nature of things must have seen. And the duty to maintain a lookout involves not only the physical act of looking, but also a reasonably prudent reaction to whatever might be seen. *One will not be heard to say*

that he looked but did not see, when a situation is open and obvious." (Italics supplied).

13 Michie's Jurisprudence 538 539, Section 25.

When plaintiff and Thompson entered the right-of-way at the time and place in question, they were only 20 feet from Tower 3, about which plaintiff warned Thompson. When they entered the right-of-way they could realize they were in it, because of the density of the undergrowth and the absence of large trees. Although it would have been a relatively simple matter to have disconnected the antenna from the pole and carry it separately across the right-of-way, as Burgess did on one occasion, plaintiff did not take this simple precaution. He had traveled only about 40 feet across the right-of-way when he encountered the conductor. He should have realized there were power lines over the remaining 60 feet of the right-of-way, otherwise why should the right-of-way have been 100 feet wide at that point? That plaintiff had never before crossed the right-of-way under this particular span is not significant with regard to his alleged contributory negligence, because he should have known the lines continued across and over the top of the mountain.

In the following case, based on an action for damages for injuries sustained from electrical shock, plaintiff admitted that he knew the electric wires ran by his residence and down the hill in the direction of the garage where he was injured, but contended that he did not know the wires extended over the garage.

Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S.E. 886, is in our opinion a much stronger case for the plaintiff than the instant case (but a recovery was there denied), since there plaintiff, an 18-year-old boy, was playing on the roof of a building (where children habitually played)

leased as a garage from defendant by his father (an employee of the company), *in the vicinity of plaintiff's home*, and was injured when he came in contact with uninsulated electric wires 16 feet from the ground and 3 feet above the ridge of the roof of said garage. Plaintiff admitted that he knew electric wires ran by his residence and down the hill in the direction of the garage, *but contended that he did not know the wires extended over the garage.*

A judgement on a directed verdict for the defendant was affirmed by our Supreme Court.

On the question of plaintiff's contributory negligence (assuming "for sake of argument" only—said the trial court—that defendant had not used due care in locating the wires) our Supreme Court quoted with approval a portion of the written opinion of the trial court, as follows:

> "If he (plaintiff) had looked there is no question but what he could have seen these wires and his failure to do that does not relieve him from the duty to exercise ordinary care for his own protection. If he had looked and observed the wires he could have determined that they were uninsulated and his knowledge of electricity and his experience in and about the mines where electricity was used would have placed him on notice that to come in contact with those wires would result in injury to him. He states in his testimony that if he had seen the wires on top of the building he would not have run into them and when asked by the court why he would not have run into them he said, 'Because they were dangerous and they would kill me.' The court is of opinion that the plaintiff in this case, due to his age, knowledge and experience is chargeable with the same degree of duty for his own safety as would be required of an adult and by the application of

the principles of law pertinent in such a case as this, the court is of opinion that the plaintiff is guilty of contributory negligence as a matter of law and therefore not entitled to recover from the defendants."

The law is well settled, the Supreme Court said, "that those who maintain electric wires carrying a dangerous voltage are required to exercise care commensurate with the danger; but they are not insurers against all injuries from the wires, and the test of their liability in case of injury is *whether a person of ordinary prudence would naturally have anticipated it.*" (Italics by the Court.)

In holding that plaintiff would not be permitted to say that he did not see that which was plainly discernible, the Court said:

"The situation here must, of course, be regarded prospectively and not in retrospect. The wires were sixteen feet from the ground *and at a place not frequented by the public at all*, and to which an adult would not ordinarily be expected to go except to repair the roof." A housetop is itself a precarious place. Defendants had the right to assume that one mounting even to the flat part of the garage roof would make observations for his own safety. In such case the wires would be *almost level with his vision, but a short distance from him and necessarily discernible.* Therefore it could not be reasonably anticipated that a person on the roof would encounter the wires inadvertently. It may be admitted that plaintiff had the legal right to climb upon the garage, but that right alone did not require the coal company to insulate or elevate the wires, since they were plainly visible. Such a requirement would make the company an insurer (a burden not imposed by law)." (Italics supplied.)

Assuming petitioner was negligent in maintaining the conductor in question at a height of fourteen feet six inches from the ground, in failing to cut undergrowth along right-of-way and in failing to insulate wire in question, plaintiff was contributorily negligent as matter of law precluding recovery.

> "If a person, by his own actions, subjects himself unnecessarily to danger which should have been anticipated, and is injured thereby, he is guilty of contributory negligence and may not recover for his injuries."
>
> *Caraglio v. Frontier Power Co.* (C.C.A. 10th), 192 F. 2d 175.

> "When the negligent act of the plaintiff is necessary to make a dangerous situation negligently created by the defendant effective in harm, the plaintiff's negligence is always a contributory factor in producing his harm and as such prevents him from recovery against the negligent defendant."
>
> Restatement of the Law of Torts—Negligence, pp. 1251, 1252, Sec. 478.

In the light of the above facts and legal principles, we confidently submit that the Court of Appeals erred in refusing to reverse the finding of the District Court that plaintiff was not guilty of contributory negligence, proximately contributing to his injury, and in refusing to hold as a matter of law that plaintiff was guilty of contributory negligence, proximately contributing to his injury.

I

The Court of Appeals erred in failing to make any findings for the guidance of the District Court and counsel on a retrial of the case.

On the question of petitioner's alleged negligence, the Court of Appeals makes the following statement: "We think that a *basis* exists for finding negligence in the combination of defendant's permitting the space under the highly charged wires to become overgrown so as to obscure the vision of persons known to frequent the general area and, in these circumstances, maintaining wires so low as to constitute a danger." (Italics supplied). (App. 13.)

Apparently, the Court says merely that a *basis* exists for a finding of negligence on the part of petitioner based on these two factors, without making a finding to that effect, and leaves to the District Court the question whether such a finding shall be made. How will the District Court proceed on the retrial of the case? Apparently the case has been remanded for a new trial of all the issues—negligence, contributory negligence and damages. Ostensibly, the Court of Appeals intends for the District Court to hear the evidence and decide the case. But suppose the District Court again decides that the place of plaintiff's injury was not "generally accessible" (the Court of Appeals made no finding to the contrary), and that there was no violation of the regulation. Will the Court of Appeals again reverse the District Court? On the new trial in the District Court, will counsel for petitioner be permitted to mention the fact that the area in question was a jungle, and that there were no paths, roads, or ways across petitioner's right-of-way at that point? If counsel go into these matters, may the District Court consider same in rendering judgment? The decision of the Court of Appeals is not clear on these points.

and leaves to speculation the procedure to be followed by the District Court on the new trial.

Conclusion

We contend that the Court of Appeals has clearly misconstrued the regulation in question and has departed from clear legal principles in reversing the judgment of the District Court when there was substantial evidence to support said judgment (which the Court of Appeals does not deny). Therefore, the judgment of the Court of Appeals should be reversed in the interest of justice by the Supreme Court in the exercise of its supervisory powers over the lower federal courts. *Gibson* v. *Lockheed Aircraft Service* (1956), 350 U.S. 356, 76 S. Ct. 366, 100 L. Ed. 393.

We, therefore, respectfully submit that the ruling of the Circuit Court of Appeals for the Fourth Circuit calls for the exercise of the supervisory power of this Court, and that a writ of certiorari should issue from this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit to the end that the judgment complained of herein may be reviewed and reversed.

Respectfuly submitted,

FRANK L. SMOOT,
Bluefield, West Virginia.
GEORGE RICHARDSON, JR.,
Bluefield, West Virginia.
Counsel for Petitioner.

JANUARY 28, 1959.

APPENDIX

I

Memorandum Opinion of District Court

February 20, 1958

The Court: I will proceed now to make my findings and conclusions. I don't purport to make them in a proper form of finding of fact and conclusions of law but just in a general discussion of how I decide the case, both as to the law and the facts.

I do not interpret the rule requiring a fifteen foot clearance as applying to all places on the right of way that are not fenced in. I interpret that rule as applying to places that are not isolated and which are reasonably usable by people. I think that under the meaning of the regulation a generally accessible place is a place where people not only can go but where they may be expected to go, at least sometimes.

Applying that meaning to the regulation, I find that as a matter of fact that this locality was very steep, that it was grown up on both sides of the right of way with heavy timber and it was grown up in the right of way with trees that were from eight to ten feet tall, that is, young saplings; that there were no avenues or paths that people could use to cross and recross the right of way under the lines and that, in fact, people did not use the general locality where the accident occurred for purposes of going back and forth under the lines.

I find that there was one instance where a TV transmission line was built underneath the 13.2 line but that was an isolated instance and so far as the evidence shows was unknown to the officials of the power company, so from that interpretation that I give to the regulation I believe there was not a violation of the regulation by the power company and I so find as a finding of fact.

That brings me to consider whether or not under the circumstances the power company was negligent from the

circumstances. I think the decision at that point depends on whether or not the accident that happened at this time was reasonably foreseeable and also what measures would have been necessary to protect against this kind of accident.

In the first place, I find up until the time of Mr. McKinney's injury most of the antennae which were located on the mountain were at a distance of a thousand feet or more from this particular spot, that the closest one was 500 feet away. I find that these antennae varied in length from six or eight feet up to as much as twenty-five or thirty feet.

Had the power company been charged with the duty of protecting against the carrying of antennae across its right of way underneath its wires, it would have been necessary in order to fully protect any person crossing with an extended antenna to keep the wires at a much higher elevation than fifteen feet. It just happened in this case that the antenna which the plaintiff was carrying was just long enough barely to reach the wire, but that was a mere fortuitous circumstance. It could just as well have been ten feet longer and could have reached up five feet or more further, and then nothing that the power company could have done other than to elevate its wires further then that would have protected the plaintiff.

Further, there had never been an accident caused by anyone carrying an object of this kind under the wire. As far as the evidence shows nobody had ever attempted it before and this was the first time that anybody had ever carried an antenna under that wire. The fact that some TV transmission lines had been run underneath the high wire in my opinion would have no bearing on the duty here.

From all these circumstances, coupled with the inaccessibility of the locality around tower number three and around the poles 31 and 32, from all this I find that the accident was not reasonably foreseeable, and it is my further opinion that at the time this power line was erected, since that was done, before any thought of TV antennae occurred to anyone, there could not be any foreseeability by any stretch

of the imagination, and I think it is not reasonable to say that if a power line is properly constructed when it is installed and if a company has exercised due and reasonable care for the protection of the public in erecting the line, that the mere fact that some one or more people begin to make a use which had not previously been made of future objects near the line could impose the duty on the company of making changes in its line to accommodate these novel usages. I find, then, from these facts that there was no negligence on the part of the power company in maintaining this line as it did.

I think I should make a further finding on the question of contributory negligence because if this case should be appealed and if the appellate court should not be of the same view that I am with reference to the interpretation of the regulation or the finding of no negligence on the part of the power company as a matter of fact, there ought to be a finding on contributory negligence, and I do not find from the evidence that the defendant has by a preponderance shown contributory negligence on the part of the plaintiff.

I can see no act that he did that a reasonably prudent and careful person would not have done under like circumstances. The fact that he should have noticed the poles when he was down in the tramroad and did not notice them in my opinion cannot be used to convict him of negligence for not looking for those same poles at the time he was hurt. Because of the undergrowth I think the preponderance of the evidence is that the wires and the poles were not readily visible, so on that issue I find that he was not guilty of contributory negligence.

I think also that I ought to make a finding as to the recovery if he should be entitled to a recovery. He has been rather seriously injured and the seriousness of the injury is accentuated by the fact that he was a watchmaker and earned considerable money at that trade and is entirely incapacitated from it. I don't think that the fact he is entirely incapacitated as a watchmaker means that he loses the entire sum of money that he would otherwise have made as a watchmaker because he is not incapaci-

tated from other forms of work, and he can use the time that he would otherwise be using as a watchmaker to engage in other remunerative activity, but in view of the fact that the work of a watchmaker is a skilled trade he has had a rather serious loss in being incapacitated from that.

Then he had quite a bit of pain and suffering and he has some permanent disability in the hand, so considering all of this and giving the weight that it seems to me should be given, I find that his total damages from this injury are $7500.

I believe I have made findings of fact and conclusions of law on all the necessary phases of the case, but if there is something else that I should find, if counsel will call it to my attention, I will make a finding.

Mr. KINGDON: If your honor please, did I understand you to indicate that on the assumption that it might be determined that the place of injury was a generally accessible place, that the injury was the proximate result of the violation of rule 232?

The COURT: Yes. I find that, and that there was no contributory negligence. . . .

II

FINAL JUDGMENT OF DISTRICT COURT

June 11, 1958

The above entitled action came on for trial before the Court without a jury on February 19th, 1958, and February 20th, 1958, at Bluefield, West Virginia, the plaintiff appearing in person and by his attorneys, Ray Toler and Arthur Ritz Kingdon, of Mullens, West Virginia, and the defendant appearing by its attorney, Frank L. Shroot, of Bluefield, West Virginia, and all parties announced ready for trial.

And thereupon the parties introduced their evidence before the Court and rested their respective cases, and the action was argued before the Court by counsel for

said parties, and the Court having duly considered the evidence, arguments of counsel, and being fully advised in the premises, now finds as follows:

Findings of Fact

(1) The plaintiff, C. C. McKinney, while crossing a right-of-way of the defendant, Appalachian Electric Power Company, on or about June 12th, 1956, and at a place thereon which is on a ridge along and at the top of Corinne Mountain near "Corinne Bottom" in Wyoming County, sustained severe personal injuries when a TV antenna he was carrying across the right-of-way, suspended in the air on a 10-foot long pole, came into contact with an unsheathed electric power transmission line of the defendant, then and there charged with 13,200 volts of electrical energy, at a place on said line where it was suspended at a level less than fifteen feet vertical clearance above the ground surface, or, more specifically, at a level between fourteen feet six inches and fourteen feet two inches above the ground by plumb-line measurement from the high-voltage line at the place on the line where the plaintiff's TV antenna contacted the high-voltage line to the ground surface below it;

(2) No negligent act or omission of duty on the part of the plaintiff, C. C. McKinney, proximately contributed to his above stated injury;

(3) The plaintiff's injury occurred in an area of the defendant's said high-voltage line right-of-way which was not, in the circumstances, a "generally accessible place" within the meaning of that term as used in Section 232 of the National Electrical Safety Code;

(4) The plaintiff's said injury on the said high-voltage line was not one which the defendant reasonably should have anticipated would occur, either at the time the said high-voltage line was erected by the defendant in 1931 or at the time the plaintiff's injury occurred in June, 1956, as a result of the defendant maintaining its high-voltage line at a vertical clearance of only fourteen feet two to six inches above the ground at the place of the plaintiff's injury;

(5) The plaintiff sustained damages, for his ills and disability attributable to his above stated injury, in the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

CONCLUSIONS OF LAW

(1) Under Section 232 of The National Electrical Safety Code, which Code during the month of June 1956 had the force of statutory law in West Virginia by virtue of an enabling statute of said State and Regulation 12 of the "Rules and Regulations for the Government of Electric Utilities" promulgated thereunder by the Public Service Commission of West Virginia prior to and in force throughout the year 1956, the defendant and other electric utilities maintaining electric power distribution lines in West Virginia owed a statutory duty throughout that year, to the plaintiff and other persons moving along or across "generally accessible places" on its rights-of-way carrying 13,200 volt lines, to maintain such high-voltage lines at a minimum vertical clearance of 15 feet above the ground in those areas of its said high-voltage lines which are suspended over "spaces or ways accessible to pedestrians only"; for a failure to observe which statutory duty, proximately resulting in injury to the plaintiff or other persons, the defendant and any other such electric utility would be liable in damages.

(2) The defendant, Appalachian Electric Power Company, owed no common law duty to the plaintiff, or any other person, under the circumstances, to erect and maintain said high-voltage line at a higher level above the ground at the place of plaintiff's injury than the above mentioned fourteen feet six inches and fourteen feet two inches, and therefore there was no negligence on the part of the defendant in the manner in which it maintained said high voltage line.

From the foregoing Findings and Conclusions the Court is of opinion that the plaintiff is not entitled to a judgment against the defendant and that the defendant is entitled to a judgment for its costs and disbursements herein expended.

Therefore it is CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, C. C. McKinney, of Corinne, West Virginia, do

take nothing of and from the defendant, Appalachian Electric Power Company; that this action be and the same is hereby dismissed on the merits; and that the defendant recover of and from the plaintiff its costs in this action expended, including an attorney's fee of $10.00.

To which said Findings of Fact and any adverse Conclusions of Law, and this ruling and Judgment of the Court, the plaintiff at the time objected and excepted.

III

Opinion of Court of Appeals, Fourth Circuit

November 12, 1958

Sobeloff, Chief Judge:

This is the plaintiff's appeal from an adverse judgment in a suit for damages for personal injuries. It was docketed in a state court of West Virginia, removed to the federal court and there tried by the District Judge, no jury trial having been prayed as provided in Rule 38 of the Federal Rules of Civil Procedure.

While carrying a television antenna mounted on a ten-foot pole, across the defendant's non-exclusive right of way on a mountainside in West Virginia, the plaintiff was severely burned when the antenna brushed against the defendant's uninsulated 13,200-vote electrical wire which was suspended about fourteen and one-half feet from the ground. Suit was brought upon two separate theories of liability—first, violation of a statutory duty; second, common law negligence.

Section 232 of the National Electrical Safety Code, which has the force of statutory law in West Virginia,[1] provides that:

"The vertical clearance of all wires above ground in *generally accessible places* or above rails shall (as to

[1] West Virginia Code of 1955, Sec. 2554; Regulation 12 of the "Rules and Regulations of West Virginia Public Service Commission for Government of Electric Utilities."

open supply line wires and service drops conducting 750 volts to 15,000 volts) be no less than the following:

. . . . . .

"(5) Spaces or ways accessible to pedestrians only . . . . . 15 feet." (Emphasis supplied.)

It is conceded that the defendant's wires at the place where the plaintiff met injury were less than fifteen feet high. The District Court held that it was not a "generally accessible place" within the meaning of Section 232, and further that the defendant owed the plaintiff no common law duty to maintain the wires higher than the existing level of fourteen and one-half feet.

The basic facts are substantially undisputed. The defendant power company supplies electricity to the city of Corinne and other communities in a mountainous area of southern West Virginia. The city itself is in a valley at the bottom of Corinne Mountain. A public highway runs between the city and the base of the mountain. While the difference in elevation between the highway and the top of the mountain is only eight hundred feet, the distance up the mountain is seventeen hundred feet. Before 1932 two high-voltage circuit lines of 88,000 and 13,200 volts, respectively, were constructed by the defendant. Beginning at the defendant's substation in the valley, these lines connect with a steel high tower (Tower 2) midway up the mountain. From that point, the 88,000-volt line veers slightly to the left and extends 1,000 feet to Tower 3 at the top of the mountain, the line continuing at a minimum height of eighty feet above the ground. The 13,200-volt line, however, leaves Tower 2 and instead of continuing to Tower 3 connects to wooden poles, which are substantially lower than the towers. These poles continue up the mountain in a direction generally paralleling the 88,000-volt circuit. Pole No. 30 is the first pole above Tower 2; the next pole, No. 31, is farther up the mountain but seventy-five feet below Tower 3; and Pole No. 32 is located over the top of the mountain, past Tower 3. The plaintiff's injuries occurred between Poles No. 31 and No. 32, about sixty feet

from Tower 3. The defendant's non-exclusive right of way under this 13,200-volt line is one hundred feet wide and was covered with a dense growth of shrubs and saplings approximately ten feet high. The defendant had last cut the undergrowth about eighteen months before the event out of which the litigation arises.

Because of the city's low elevation, television reception is poor. Consequently, since 1951 many persons have constructed and maintained TV antennae systems on the mountain for residents of Corinne in the valley below. These systems are installed by locating TV antennae on the mountain and running cables and transmission lines from the antennae down the mountain to a central point in the city, and thence into the homes. In 1953 the plaintiff constructed his own antenna system on the mountain to service sixteen subscribers in the community.

Pedestrian travel on the mountain is normally limited to seasonal berry pickers, hunters and, at an increasing rate in recent years, those who maintain TV antennae and come to inspect their equipment about once a week. There are well-defined paths on the mountain, and one narrow road passes near the base of Tower 2. Although most of the TV systems are located in the Tower 2 area more than five hundred feet from the scene of the accident, some antennae are in close proximity to Tower 3, and one TV operator's cable crosses the defendant's right of way between Poles No. 31 and No. 32, where the plaintiff was injured.

On a day in June, 1956, the plaintiff removed one of his antennae near Tower 2 in order to relocate it in a place where a clearer signal could be obtained. After mounting the antenna on his ten-foot pole, he proceeded with it to a point where he eventually picked up a satisfactory signal near Tower 3. To avoid static interference from the power line, he decided to place the antenna farther across the mountain. Accordingly, he started to traverse the defendant's right of way near Tower 3 and, because of the thick undergrowth, he elevated the pole above his head to protect the antenna. The plaintiff insists that he was unaware that the 88,000-volt line and the 13,200-volt line separated

at Tower 2, and was under the impression as he moved away from the tower that he had cleared the lines, which he was led to believe were in any event eighty feet overhead and, therefore, no source of danger. He testified that due to the height of the undergrowth and the misleading appearances, he did not see the wire or the poles. The electric shock which he sustained when his antenna brushed against the 13,200-volt line rendered the plaintiff unconscious, and he suffered third degree burns to his right hand, resulting in a permanently atrophied and hypersensitive thumb.

Our problem in respect to subsection (5) of Section 232 concerns the interpretation of the phrase "spaces or ways accessible to pedestrians only." The defendant points to the introductory sentence of the Section, which pertains not alone to spaces and ways accessible to pedestrians only where the prescribed elevation is fifteen feet, but also to streets, alleys, and roads in urban and rural districts, and to driveways to residence garages, where a twenty-foot elevation is required. The opening sentence delineates the over-all coverage of the entire section and speaks of "generally accessible places." From this the defendant argues that the phrase in subsection (5), "spaces or ways accessible to pedestrians only," means spaces or ways that are generally accessible. Adopting the defendant's view, we are still left with the problem of interpreting the word "generally" itself. It may be granted that to give a reasonable construction to the word "accessible" in subsection (5), the notion of accessibility is not to be stretched to include every place to which it is physically possible for someone somehow to gain access. On the other hand, it is not to be construed so narrowly as to limit the protection of the statute to places that are accessible to all classes of the public.

As heretofore indicated, the District Judge found that the place of the injury was not a "generally accessible place" within the meaning of that term as used in Section 232. At one point in his opinion, the District Judge did define a generally accessible place as one "where people not only can go but where they may be expected to go, at

least sometimes." However, in applying the statute to the facts, he gave special emphasis to the absence of "avenues and paths" across the defendant's right of way. We think that this application of the law was erroneous because it insisted upon too high a degree of accessibility.

The manifest purpose of subsection (5) is to protect pedestrians against dangers potentially arising from the maintenance of high voltage wires. Electrical lines are frequently located in sparsely populated rural areas where pedestrian movement may be limited to certain classes of users. We think that the statute applies not only to spaces or ways available to all members of the public; it is sufficient if a segment of the pedestrian public frequents the area. Nor is the absence of well-defined roadways or paths controlling. In this case there is uncontroverted testimony of activities of hunters and berry pickers on Corinne Mountain and, in recent years, the increased utilization of the mountain for the maintenance of TV facilities. It cannot be supposed that the defendant was ignorant of these extensive activities. Not only did the defendant's maintenance crews frequent the area, but it was testified that on occasion the defendant's line foreman helped the plaintiff relocate his antennae. Moreover, there is no suggestion that the mountain, and particularly the Tower 3 area, is not accessible on foot. Indeed, the steepest part of the mountain is below the Tower 2 area. Upon our interpretation of Section 232, as distinguished from the stricter construction given by the District Judge, there was substantial evidence to support a finding that the plaintiff was injured in a place within the meaning of the statute.

There was also testimony to show that the top of the antennae brushed the wire, and that if the wire had been several inches higher, this would not have occurred. If the statute is applicable, then a violation proximately causing an injury gives rise to a cause of action. *State Road Commission* v. *Ball*, 138 W. Va. 349, 76 S.E. 2d 55, 58 (1953).

The second ground upon which this suit is prosecuted is the defendant's alleged negligence, irrespective of the statute. The plaintiff charges the defendant with failure

to exercise reasonable care to avoid a foreseeable danger. While the statutory and the common law causes of action are legally distinguishable, the factors of decision are closely related. In determining the common law duty, as in applying the statute, some account must be taken of the extent of the use made of the general area by, at least certain parts of, the public. The extent of pedestrian use of the surrounding area and the likelihood that someone might cross the defendant's non-exclusive right of way and thereby become exposed to danger bear upon the element of foreseeability. *Love* v. *Virginia Power Co.*, 86 W. Va. 393, 103 S.E. 352, 354 (1920). No exception could be taken to the District Judge's statement of the law that the defendant's liability depends upon the reasonable foreseeability of the injury. *Northern Virginia Power Co.* v. *Bailey*, 194 Va. 464, 73 S.E. 2d 425, 428 (1952); *Fisher* v. *Flanagan Coal Co.*, 86 W. Va. 460, 103 S.E. 359, 360 (1920); RESTATEMENT, TORTS, Sec. 302, Comment c, at 816 (1934 Ed.). But in deciding the question of common law negligence, the District Judge was undoubtedly influenced, as he evidently was in applying the statute, by an undue construction of the term "accessible." We think that a basis exists for finding negligence in the combination of defendant's permitting the space under the highly charged wires to become overgrown so as to obscure the vision of persons known to frequent the general area and, in these circumstances, maintaining wires so low as to constitute a danger.

Being of the opinion that the Court's findings were influenced, if not induced, by an erroneous interpretation of the statutory and common law duty of the defendant, the judgment must be set aside. See: *Cleo Syrup Corporation* v. *Coca-Cola Co.*, 139 F. 2d 416, 418 (8 cir., 1943, cert. den. 321 U.S. 781 (1944); *Carpenter* v. *Ohio River Sand & Gravel Corp.*, 134 W. Va. 587, 60 S.E. 2d 242, 245 (1950).

The defendant contended in the District Court and here that the plaintiff himself was negligent in not realizing, when he entered the defendant's right of way, that a circuit line continued from Tower 2 up the mountain a

a reduced elevation on the wooden poles. The defendant relies on the fact that the right of way had been cleared in December, 1954, affording an unobstructed view of the poles and wires for many months thereafter. It argues that since the plaintiff visited the mountain during that time, he must have noticed them, and should be charged with this knowledge in June, 1956. It is not disputed, however, that for an appreciable period before the time of the injury in June, 1956, the poles, spaced several hundred feet apart, and the wires, were not readily visible from anywhere on the mountain and especially not to a person who might enter the right of way covered by a growth ten feet high. On this issue, the Court concluded that the defendant had not met its burden of showing that the plaintiff knew or should have appreciated when he carried the antenna aloft, that he was near a low-hanging power line. See RESTATEMENT, TORTS, Sec. 289, Comment f, at 766 (1934 Ed.).

Since a retrial is necessary on the issue of the defendant's negligence, on both theories alleged by the plaintiff, we think it fair for the question of the plaintiff's contributory negligence to be decided at the same time by the trier of the facts on all the evidence. The District Court, allowing for a possible reversal, assessed the plaintiff's damages at $7500.00. We think, however, that the question of damages should also be determined in the retrial of the case, in the event of a verdict for the plaintiff. The questions are so closely intertwined that separate determinations would be undesirable.

The judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.